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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **KENNETH TANKSLEY,** **Defendant and Appellant.**	**A134690** **(Contra Costa County Super. Ct. No. 1106780)**

Appellant Kenneth Tanksley was tried before a jury and convicted of assault by means of force likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(1).)[1] He contends the judgment must be reversed because (1) the court excluded defense evidence that the victim had threatened appellant's girlfriend; (2) the court omitted language from CALCRIM No. 3470 that would have advised the jurors they could consider the victim's threats to a third party when evaluating appellant's claim of self-defense; and (3) the cumulative effect of these alleged errors was prejudicial. Appellant also argues that the court lacked jurisdiction to issue an order that he stay away from the victim for three years, a point the People concede. We will order the judgment modified to vacate the stay-away order, but otherwise affirm.

[1] Further statutory references are to the Penal Code unless otherwise indicated.

FACTS AND PROCEDURAL HISTORY

Marlon Jefferson met Sondra Wyrick on the MySpace Internet site and the two became friends. He attended a birthday party for Wyrick's daughter and met appellant at the party. He also saw appellant on another occasion. In November or December 2010, Wyrick told Jefferson that she had a boyfriend (appellant) and did not want Jefferson to contact her again. Appellant talked to Jefferson on the phone and told him to stop calling Wyrick.

On January 4, 2011, Jefferson gave a friend of his a ride to a Laundromat near Wyrick's home in Pittsburg. As he was leaving the Laundromat, appellant walked up to him and said, "You're the motherfucker talking shit on the phone." Jefferson asked him what he was talking about, and appellant punched Jefferson in the face. Jefferson fell down and appellant hit him several more times, knocking his head against the ground. Appellant continued striking Jefferson until someone pulled him away. The incident was captured on the Laundromat's surveillance video.

After the attack, Jefferson was bloody and dazed. He called the police, who arrived shortly, and claimed not to know the person who had hit him. He suggested, "It must have been a case of mistaken identity." Jefferson was taken to the hospital for treatment of his injuries, which included lacerations, a fractured nose, and a cracked tooth.

Sometime in mid-January 2011, Jefferson was interviewed by Detective Wilkie of the Pittsburg Police Department. Jefferson was shown a photographic lineup that included a picture of appellant, but he said he did not recognize anyone. Wilkie noticed that Jefferson's hands were shaking and asked him what was wrong; Jefferson said he was "terrified." Jefferson spoke to the police several times without identifying appellant as his attacker. During the final interview, he was asked if he knew Sondra Wyrick and realized his assailant was Wyrick's boyfriend.

Appellant was charged with assault by means of force likely to produce great bodily injury and a great bodily injury enhancement. (§§ 245, subd. (a)(1), 12022.7, subd. (a).) A jury trial was held, at which Jefferson testified and admitted that he had lied

to the police about not knowing appellant. Jefferson explained that he had been "terrified." He claimed that before the attack, appellant had spoken to him on Wyrick's cell phone and told him, "If you don't stop, I am going to do something to you."

Sondra Wyrick testified that she and Jefferson became casual friends after meeting on the MySpace site. She thought he seemed like a nice person and invited him to a social event at her apartment and a birthday party for her daughter, which appellant also attended. She introduced appellant and Jefferson at the birthday party, and they had a brief, pleasant conversation. A couple of weeks after Wyrick started dating appellant, she told Jefferson to stop contacting her, but Jefferson kept sending her text messages asking her to be his girlfriend. Wyrick told him she already had a boyfriend, and felt "disrespected" that he would not leave her alone. Once when Jefferson called her, appellant got on the phone and talked to him. Jefferson continued to contact her and eventually she changed her cell phone number.

Appellant testified that he was Wyrick's boyfriend and lived with her and her mother in the fall of 2010. He had met Jefferson and knew him to be a friend of Wyrick's. On one occasion, according to appellant, Jefferson showed him a gun that looked real and told him, "You don't know nothin' about guns." Appellant thought Jefferson was showing off and did not take this as a threat.

Appellant's attitude toward Jefferson changed when Jefferson refused to stop contacting Wyrick. On one occasion, appellant took the phone from Wyrick and told Jefferson to stop calling. According to appellant, Jefferson responded by saying, "Fuck you, bitch. I'll kill you." Appellant called him back and left a message saying that "wasn't cool," and Jefferson sent a text message to Wyrick threatening to "beat [appellant's] ass." Appellant thought Jefferson seemed "bipolar" in the messages he sent to Wyrick, because he would ask Wyrick how she was doing and then threaten to beat appellant. The text messages scared appellant, who told Wyrick to call the police.

Appellant testified that Jefferson continued his unwelcome contact. After Wyrick changed her cell phone number, he saw Jefferson drive by their apartment and he began to worry. On January 4, 2011, appellant saw Jefferson's car in the area and looked

around because he did not want to "get snuck up on." He walked to a convenience store with a friend, and after buying cigarettes, saw Jefferson come out of a Laundromat. Appellant testified that he thought Jefferson was carrying something in his hand (something he never mentioned to the police when he was interviewed about the incident), but he confronted Jefferson and asked him, "What's that shit you were saying?" Jefferson responded by saying he didn't "give a fuck" and appellant saw him "flinch." Thinking Jefferson was going to hit him, appellant punched Jefferson. He then "blacked out" and did not realize he was still hitting Jefferson until someone pulled him away. Appellant had viewed the video tape of the incident and described his response to Jefferson as a "big overreaction." He explained, "I was kind of scared. My senses [were] bugging out. He already told me he was going to kill me, and then when he said he didn't give a fuck about what the conversation was over the phone, I felt like it was the same thing, like take his threat serious[ly]." Appellant had seen text messages from Jefferson to Wyrick telling her to bring appellant over so he could "beat his ass," and he took the threat seriously.

The jury found appellant guilty of aggravated assault as charged, but found the great bodily injury enhancement not true. The court sentenced appellant to prison for the three-year middle term and ordered that he have no contact with Jefferson for three years.

DISCUSSION

1. *Evidence of Victim's Threats to Appellant's Girlfriend*

Appellant argues that the trial court deprived him of his constitutional right to present a defense by excluding evidence that Jefferson had made threats of violence against Wyrick. We reject the claim.

Generally speaking, evidence of a victim's threat of violence against a third party is admissible to support a claim of self-defense when there is evidence the defendant knew about the threat. (*People v. Davis* (1965) 63 Cal.2d 648, 656-657 (*Davis*); *People v. Spencer* (1996) 51 Cal.App.4th 1208, 1219 (*Spencer*).) A defendant is "entitled to corroborate his testimony that he was in fear for his life by proving the reasonableness of such fear" (*Davis,* at p. 656); knowledge that the alleged victim has threatened other

people with violence tends to show that the defendant's fear of the alleged victim is reasonable. (See *Spencer,* at p. 1220.) Here, contrary to appellant's assertions, the defense did not attempt to prove that appellant was frightened of Jefferson because he knew Jefferson had threatened Wyrick with violence.

The issue arose when, prior to opening statements, the prosecution sought to exclude testimony by Wyrick as irrelevant, given that she had not been at the scene of the assault and had testified at the preliminary hearing that it had been several months since she had heard from Jefferson. Defense counsel stated that she intended to call Wyrick to support appellant's own testimony that he was aware of problematic contacts with Jefferson near the time of the incident. Counsel elaborated, "*I don't think I have evidence of threats. That's not what we're offering*. We have evidence of harassment that caused [appellant] to feel threatened by this person's continued unwanted presence. And I'm not going to have [Wyrick] testify, I think, to any specific threats if you're remembering something in the police report." (Italics added.) The court indicated that evidence of threats against Wyrick did not appear to be relevant at that point.

The prosecutor noted that Wyrick had claimed to have called the police at one point because Jefferson threatened to "beat her ass,"[2] but defense counsel clarified, "*I wasn't going to say that Mr. Jefferson had ever threatened her*, but I was going to say that they had this relationship and that she started not wanting contact and that he became obsessive and was frequently texting her and giving her frequent unwanted calls and that her boyfriend was aware, and he was nervous about it, too." (Italics added.) The prosecutor stated she would not object to Wyrick being called to corroborate testimony by appellant to that effect, but that for the time being, counsel's opening statement should simply reference a break in the relationship between Jefferson and Wyrick and appellant's awareness of that situation. Defense counsel indicated that she intended to say that appellant was aware of Jefferson's unwanted contact, and the prosecution agreed to this characterization of the evidence to be offered.

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[2] The statement appears in a report by a defense investigator that was lodged as the Court's Exhibit 1 but was not presented to the jury in any form.

Consistent with these representations, defense counsel called Wyrick as a witness but did not ask her whether Jefferson had ever threatened her with violence. Instead, she elicited testimony by Wyrick describing her friendship and falling out with Jefferson, his pattern of frequently texting and calling her even after she had asked him to stop, and her decision to change her telephone number as a consequence. During redirect examination, defense counsel asked, "What observations that you had of [Jefferson] led you to testify that at one point he was pleasant and another point he was mad? What did you see or hear?" Wyrick answered, "He started threatening me," at which point the court sustained the prosecution's relevance objection and ordered that answer stricken. Wyrick went on to testify (with no objection from the prosecution) that her communications with Jefferson became hostile. The court sustained the prosecution's objection when defense counsel asked Wyrick whether Jefferson had told her he was angry with appellant because appellant was her boyfriend.

When appellant took the stand, he described his interactions with Jefferson, including a telephone conversation in which he told Jefferson to stop calling Wyrick and to which Jefferson purportedly responded, "Fuck you, bitch. I'll kill you." Appellant also testified that he saw text messages in which Jefferson threatened to beat appellant up. Appellant did not testify that he knew about any threats of violence made by Jefferson to Wyrick, and defense counsel never made an offer of proof that he could give such testimony. Appellant claimed to have beaten Jefferson because he saw him "flinch" and thought Jefferson was about to hit him.

On this record, we cannot say that the court abused its discretion by excluding evidence of Jefferson's threats to Wyrick. (See *People v. Fuiava* (2012) 53 Cal.4th 622, 663-665 (*Fuiava*).) The defense never offered evidence of such threats, which would have been relevant only if appellant knew about them. (*Spencer*, *supra*, 51 Cal.App.4th 1219-1220.) No attempt was ever made by the defense to show that this was the case.

Even if we assume the defense could have established that appellant knew Jefferson had threatened Wyrick with harm, reversal is not required. Because the trial court merely rejected some evidence concerning appellant's claim of self-defense, and

did not preclude him from presenting that defense, any error is one of state law and is properly reviewed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. McNeal* (2009) 46 Cal.4th 1183, 1203.) This standard, which asks whether it is reasonably probable the defendant would have received a more favorable result absent the error (*Watson* at p. 836), is not satisfied here.

Appellant testified that Jefferson had threatened him with violence, and the jury heard considerable evidence about Jefferson's harassing conduct toward Wyrick after she attempted to end their friendship. Evidence that Jefferson might have also threatened Wyrick with physical harm would not have materially altered the jury's picture of the case. Notwithstanding the history between Wyrick, appellant, and Jefferson, the evidence was uncontradicted that at the time of the assault, appellant approached Jefferson and hit him several times, continuing to do so even after he had fallen to the ground. Appellant's claim at trial that he saw something in Jefferson's hand was never mentioned to the police during the investigation, and his vague description of a "flinch" by Jefferson was a weak basis for suggesting that harm was imminent and an assault was justified. Appellant's self-defense claim was defeated by the nature of the attack itself (captured on a videotape and viewed by the jury), and it is not reasonably probable that evidence of an unexecuted threat against Wyrick (who was not present at the time of the attack) would have changed the outcome of the trial.

In his reply brief, appellant argues for the first time that "evidence of Jefferson's aggressive behavior towards third parties was relevant, even if appellant was not aware of those specific acts of aggression. . . ." He cites case law discussing victim character evidence under Evidence Code section 1103, subdivision (a), which allows a defendant charged with a violent crime to introduce evidence of specific acts of violence by the victim to show that the victim has a violent character and was the aggressor in the current offense. (*People v. Wright* (1985) 39 Cal.3d 576, 587; *People v. Rowland* (1968) 262 Cal.App.2d 790, 797-798.) Appellant has forfeited this issue by its untimely presentation (*People v. Becker* (2010) 183 Cal.App.4th 1151, 1156), but we would also find any error harmless for the reasons just discussed.

2. *Failure to Instruct on Victim's Prior Threats Against Third Party*

The trial court instructed the jury with CALCRIM No. 3470, which defined self-defense.[3] Over defense objection, the court deleted a paragraph from the form instruction

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[3] "Self-defense is a defense to the crime charged in Count 1, Assault by Force Likely to Produce Great Bodily Injury, and to the lesser included offense of Simple Assault. The defendant is not guilty of those crimes if he used force against the other person in lawful self-defense. The defendant acted in lawful self-defense if:

"1. The defendant reasonably believed that he was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully;

"2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;

"AND

"3. The defendant used no more force than was reasonably necessary to defend against that danger.

"Belief in future harm is not sufficient, no matter how great or likely the harm is believed to be. The defendant must have believed there was imminent danger of violence to himself. The defendant's belief must have been reasonable, and he must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful self-defense.

"When deciding whether defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not have to have actually existed.

"[¶] . . . .

"If you find that Marlon Jefferson threatened or harmed the defendant in the past, you may consider that information in deciding whether defendant's conduct and beliefs were reasonable.

"Someone who has been threatened or harmed by a person in the past is justified in acting more quickly or taking greater self-defense measures against that person.

"A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of death or bodily injury has passed. This is so even if safety could have been achieved by retreating.

"The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. If the People have not met this burden, you

that would have advised the jurors: "If you find that the defendant knew that [the victim] had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable." Appellant argues that the court erred in omitting this language and in so doing deprived him of his constitutional right to present a defense. We disagree.

A successful claim of self-defense requires an actual and reasonable belief in the need to defend against imminent harm. (*People v. Jefferson* (2004) 119 Cal.App.4th 508, 518.) Prior threats or acts of violence by the victim against the defendant are relevant to show that a reasonable person in the defendant's position would have feared imminent harm. (See *People v. Minifie* (1996) 13 Cal.4th 1055, 1068-1069.) A victim's prior threats against a third person are also admissible to show that the defendant acted reasonably if the defendant was aware of those threats. (*Spencer, supra*, 51 Cal.App.4th at pp.1219-1220.) A defendant's request for an instruction to this effect should be given when supported by the evidence. (*Id*. at p. 1220.)

As discussed in the preceding section, there was no evidence that appellant feared Jefferson because Jefferson had threatened Wyrick. Though a defense investigator's report apparently indicated that at some point Jefferson threatened to "beat [Wyrick's] ass," defense counsel made no offer of proof that appellant was aware of this remark. Jefferson's arguably harassing conduct toward Wyrick—calling her repeatedly, driving by her home—did not rise to the level of "threats" giving rise to a perceived need to defend against physical harm.

Even if Jefferson's repeated attempts to contact Wyrick could be construed as threats within the meaning of the omitted paragraph of CALCRIM No. 3470, reversal is not required. Appellant testified that he attacked Jefferson because he was afraid Jefferson would attack him. CALCRIM No. 3470, as given, advised the jurors that when determining the reasonableness of this belief, they could consider "all the circumstances as they were known to and appeared to the defendant and consider what a reasonable

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must find the defendant not guilty of Assault By Force Likely to Produce Great Bodily Injury, charged in Count 1, or the lesser included offense of Simple Assault."

person in a similar situation with similar knowledge would have believed." The jurors heard evidence that appellant knew Jefferson was contacting his girlfriend after she had asked him to stop and they were free to consider that evidence and its possible effect on his state of mind. (See *Spencer*, *supra*, 51 Cal.App.4th at pp. 1220-1221.) It is not reasonably probable the verdict would have been more favorable to appellant had the omitted language of CALCRIM No. 3470 been included. (*Id.* at p. 1221 [finding similar omission harmless under state law standard of prejudice articulated in *Watson*, *supra*, 46 Cal.2d at p. 836].)

We disagree with appellant that the court's refusal to include the paragraph regarding threats to others implicates appellant's federal constitutional rights and requires an analysis of prejudice under the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24. Assuming this omission adversely *affected* the defense, it did not deprive appellant of his right to present a defense. (*Spencer*, *supra*, 51 Cal.App.4th at p. 1221.)

3. *Cumulative Error*

Appellant argues that the court's evidentiary and instructional errors were cumulatively prejudicial even if they were individually harmless. To the extent we have assumed for the sake of argument that errors occurred, those errors, considered cumulatively, did not deprive appellant of a fair trial and do not require reversal. (*Fuiava*, *supra*, 53 Cal.4th at p. 716.)

4. *Stay-Away Order*

The trial court issued a post-trial protective order requiring appellant to have no contact with Marlon Jefferson for three years. Although appellant did not object in the trial court, he now argues that the protective order exceeded the court's jurisdiction. The People appropriately concede the issue.

Because this was not a domestic violence case, and because appellant was not placed on probation, the only conceivable basis for the protective order was section 136.2. (*People v. Ponce* (2009) 173 Cal.App.4th 378, 382-383; compare § 1203.097.) Section 136.2, subdivision (a)(4), empowers the trial court to issue a

protective order "upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur," but such orders are operative only during the pendency of the criminal proceedings and as prejudgment orders. (*Ponce* at pp. 382-383; *People v. Stone* (2004) 123 Cal.App.4th 153, 159.) The protective order must be stricken.

DISPOSITION

The judgment is modified to vacate the protective order requiring appellant to stay away from Marlon Jefferson for a period of three years. As so modified, the judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.

SIMONS, J.